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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER NAVARRO ROJAS,

Defendant and Appellant.

F037599

(Super. Ct. No. 54154)

**OPINION**

**THE COURT**[*]

APPEAL from a judgment of the Superior Court of Tulare County. John P. Moran and Gerald F. Sevier, Judge.[*]

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, Stan Cross and Peter H. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Ardaiz, P.J., Vartabedian, J. and Buckley, J.

[*] Judge Moran heard the trial and Judge Sevier heard the Penal Code section 1538.5 motion.

**-ooOoo-**

Appellant, Javier Navarro Rojas, was charged with two counts of selling methamphetamine (Health & Saf. Code, § 11379, subd. (a)), and one count of possession of methamphetamine for sale. (Health & Saf. Code, § 11378.) It was further alleged that appellant had sustained two prior drug convictions (Health & Saf. Code, § 11370.2, subd. (a)), that the methamphetamine in the second sale exceeded one kilogram by weight (Health & Saf. Code, § 11370.4, subd. (b)(1)), and that appellant was personally armed with a firearm at the time of the second sale. (Pen Code, § 12022, dubs. (c).)

Appellant moved to suppress methamphetamine recovered during the execution of a search warrant of his home. The motion was denied and appellant pled guilty to possession of methamphetamine for sale. He also admitted that he had sustained the two prior drug convictions, that the methamphetamine exceeded one kilogram, and that he was personally armed with a firearm at the time of the offense.

Appellant was sentenced to nine years in state prison. His timely appeal challenges the denial of his motion to suppress.

**FACTS**[1]

On February 15, 2000, a reliable confidential informant (CI) met with appellant at appellant's home and negotiated the purchase of five pounds of methamphetamine. Appellant gave the CI a sample of methamphetamine on the understanding that the CI would return on the 16th to complete the sale.

On February 16, 2000, appellant's residence was under surveillance by numerous agents from the United States Drug Enforcement Administration, Visalia Police

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**1** Both parties' briefs recite facts contained in the probation report. As the appeal relates only to the motion to suppress, we consider only the evidence presented at the hearing of that motion.

Department, and the Tulare County Narcotic Task Force. Tulare County Deputy Sheriff Steven A. Sanchez, the case agent in charge of the investigation of appellant, observed the CI arrive and meet with appellant in the yard. On the CI's exit and prearranged signal, Sanchez alerted the entry team to secure the residence. Some five minutes later, the residence and its approximately 14 occupants were secured.

Sanchez participated in an unproductive protective sweep of the house for additional subjects, weapons, and a blue box described by the CI as containing methamphetamine. He then left the residence for approximately three hours to obtain a search warrant. The occupants were held, and the scene frozen, until Sanchez returned with the warrant. Thereafter, law enforcement personnel conducted a thorough search of the residence and its grounds, outbuildings and vehicles parked at the residence. The search readily uncovered two handguns, money, and indicia that appellant was a tenant of the dwelling.

The blue box of methamphetamine proved more elusive. Sanchez expected the box would be in the house, as reported by the CI, and was concerned when it could not be located. After nearly two hours of searching, the box of methamphetamine was finally discovered on the driver's seat of a yellow Datsun pickup truck parked near the residence.

The yellow pickup, however, was not listed on the search warrant, whereas two other vehicles -- a gray Chevrolet pickup registered to and driven by appellant, and a maroon sedan, driven by a suspect previously observed to have met with appellant -- were specified in the warrant. An attachment to the warrant provided it included "any vehicles leaving or arriving at the residences and vehicles parked near the residence which are connected to the residence through paperwork or officer observations."

Steve Abbott, the sergeant in charge of narcotics at the Visalia Police Department, testified that he observed all three vehicles (a gray Chevrolet pickup, a maroon sedan, and a yellow Nissan or Toyota pickup) arrive at the subject property during his surveillance. All the vehicles arrived at or near the same time, just a few minutes before the officers

received the signal to secure the area. The yellow truck pulled in and parked facing traffic on the west side of the residence. When the driver of the truck exited the vehicle, he walked straight towards the residence, although Abbott did not actually see him enter appellant's house. Abbott broadcast his observations of the yellow truck on the radio and expected that the case agent would have made note of them.

Sanchez explained that he specified the gray pickup and maroon sedan in the warrant because he observed appellant drive the gray truck to an intersection where he met with the driver of the maroon car and both returned to appellant's residence. Sanchez did not see the yellow pickup until the residence had been secured. He testified it was of no interest to him at the time he applied for the warrant.

The individual who ultimately found the box, Steve Madsen, a special agent with the United States Department of Justice, Drug Enforcement Administration, never saw the search warrant. He was told to look for a blue box potentially containing contraband and that he could search all vehicles on or around the perimeter of the residence. The box was in plain view on the driver's seat of the yellow pickup.

At the suppression hearing, appellant argued that no exigent circumstances justified the initial entry of appellant's residence. He further argued that the search of the yellow pickup was invalid because it was identified prior to the issuance of the warrant yet not included in the search warrant. Moreover, the warrant's general language regarding vehicle searches lacked particularity and granted the searching officers too much discretion in determining where to search. Appellant asserted he had standing to contest the search of the truck because the prosecution claimed the vehicle search was within the scope of the search warrant for appellant's house, and appellant indisputably had standing to contest the search of his house.

The People argued that exigent circumstances justified the initial entry because of the large number of people at the residence, several vehicles, and the likelihood that the suspects would become suspicious when the CI failed to promptly return with the

purchase money. Thus, there was a high risk of destruction of evidence. The prosecutor contended that the general language of the search warrant provided officers appropriate guidelines for vehicle searches. The search of the yellow Datsun pickup was valid under the warrant because it was specifically linked to the target residence by officer observation.

The trial court issued the following ruling denying appellant's motion to suppress:

> "First of all, Mr. Rojas has not demonstrated any legitimate expectation of privacy as to the yellow pickup. So he does not have any standing.
>
> "Even -- as to the other issues in the case, even without, there were exigent circumstances existing which did allow the officers to secure the residence until such time a warrant was obtained. A search warrant was obtained.
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> "I further find that the Attachment B to the authorization to search is -- does -- the language in the last sentence of Attachment B does allow -- did allow under the circumstances that existed at the time of action of the officers to search the vehicle, both so far as vehicles arriving at the residence -- that that was -- I can only infer that that information -- I don't know why it wasn't told to me, but I don't find that determinative of the issue because of the testimony of the officer who saw the blue box, and the blue box was ultimately apparently the target of the search."
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> So for all of those reasons, the motion is denied.

Appellant contends the trial court erred in denying the motion to suppress evidence because he had standing to contest the search of the truck, the initial entry of the property was not justified by exigent circumstances, and the search of the truck was beyond the scope of the warrant. We conclude appellant had no right to privacy in the yellow truck and affirm.

## THE MOTION TO SUPPRESS PROPERLY DENIED

### 1. Appellant's Fourth Amendment Rights[2] Were Not Violated

"Both the United States Constitution and the Constitution and statutory law of California require that a search warrant describe with particularity the place to be searched. (U.S. Const., 4th Amend; Cal. Const., art. I, § 13; Pen. Code, § 1525.) Whether this requirement is met is a question of law on which an appellate court makes an independent judgment. [Citation.] " (*People v. MacAvoy* (1984) 162 Cal.App.3d 746, 753-754.)

However, Fourth Amendment rights are personal rights which may not be vicariously asserted. Only the defendant whose own constitutional rights were infringed has standing to challenge the legality of a search and seizure under the Fourth Amendment. (*Rakas v. Illinois*, *supra*, 439 U.S. 128, at p. 143; *People v*. *Jenkins* (2000) 22 Cal.4th 900, 972.) The defendant bears the burden of showing a legitimate expectation of privacy in the particular area searched or thing seized in order to bring a Fourth Amendment challenge. (*Rakas v. Illinois*, *supra*, 439 U.S. at pp. 130-131, 148-149; *People* v. *Jenkins*, *supra*, 22 Cal.4th at p. 972.)

In other words, before invoking the "'fruit of the poisonous tree doctrine,'" appellant must first prove that he has a Fourth Amendment right in the tree. (See *People v. Madrid* (1992) 7 Cal.App.4th 1888, 1898.) Appellant has not met this burden.

Appellant does not contend that he owned the yellow pickup, blue box or the methamphetamine. In evaluating a defendant's privacy rights in items seized we consider """'whether the defendant has a [property or] possessory interest in the thing seized or the

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**2** The United States Supreme Court and the California Supreme Court have disapproved the use of the word "standing" in discussing Fourth Amendment claims. (*Rakas v. Illinois* (1978) 439 U.S. 128; *People v. Ayala* (2000) 23 Cal.4th 225, 254, fn. 3.)

place searched; whether he has the right to exclude others from that place; whether he has exhibited a subjective expectation that it would remain free from governmental invasion, whether he took normal precautions to maintain his privacy and whether he was legitimately on the premises.'"'" (*People* v. *McPeters* (1992) 2 Cal.4th 1148, 1172, citing *Rawlings v. Kentucky* (1980) 448 U.S. 98, 105.)

Appellant introduced no evidence that he ever possessed the pickup, the box, or drugs.[3] Appellant was not observed driving the vehicle, riding in the vehicle, placing anything inside of, or removing anything from, the vehicle. Nothing in the record indicates that appellant could exclude any others from the vehicle despite the fact that it was illegally parked on a public street next to his residence. Indeed, no evidence suggests that appellant was ever aware of the vehicle's existence. As such, he can hardly claim that he had any expectation of privacy in the yellow truck.

Appellant's sole basis for his asserted right of privacy in the truck is the fact that the truck was searched pursuant to a warrant for appellant's residence. His argument is simply a version of "automatic" or "target" standing, a concept which the United States Supreme Court rejected in *United States v. Salvucci* (1980) 448 U.S. 83, 85, 90 [under substantive Fourth Amendment principles "a prosecutor may simultaneously maintain that a defendant criminally possessed the seized good, but was not subject to a Fourth Amendment deprivation, without legal contradiction."].)

Appellant cites *United States v. Bagley* (9th Cir. 1985) 772 F.2d 482 for the proposition "'the government may not argue the facts both ways in order to defeat an expectation of privacy.'" (*Id*. at p. 489.) *Bagley*, is however, entirely distinguishable, as a jury in that case had already determined that the defendant possessed the car which was

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[3] Sanchez' testimony that appellant showed the CI the methamphetamine and contracted for its sale, is hearsay.

the subject of the challenged search. The *Bagley* court based its finding that the defendant has a legitimate expectation of privacy in the car "upon a defendant's right to raise constitutional errors on appeal which are consistent with the jury's factual determinations during the trial." (*Ibid*.)

The instant record contains no evidence which supports even an inference that appellant had any expectation of privacy in the yellow Datsun truck. Thus he had Fourth Amendment rights with respect to the yellow truck and we need not address appellant's other arguments. The motion to suppress was properly denied.

**DISPOSITION**

The judgment is affirmed.